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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-355

John O. May ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND APPENDICES

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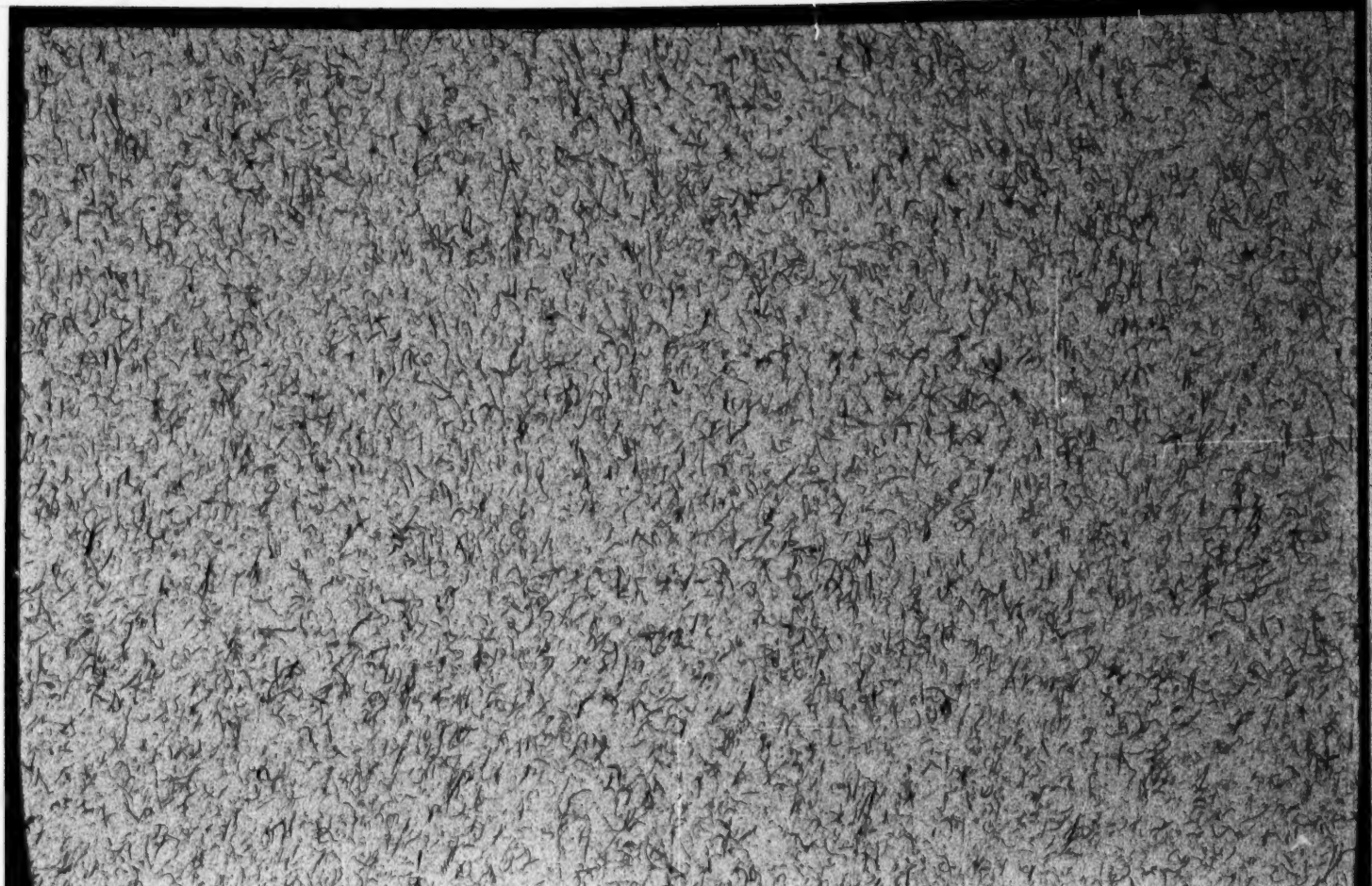

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No. _____

John O. May ..... *Petitioner*

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND APPENDICES

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The petitioner, John O. May, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas which reversed his conviction of inducing an abortion because of the exclusion of certain evidence, but remanded the case for retrial holding that he could not challenge the Arkansas abortion statutes.

CITATION TO OPINIONS BELOW

The majority opinion of the Arkansas Supreme Court has been reproduced at Appendix A, *infra*, p. 9, and is reported in Advanced Reports, No. 5, 254 Ark. 194. The dissent of Mr. Justice Byrd appears in the same publication and is reported at 254 Ark. 197. The dissenting opinion is copied at Appendix B, *infra*, p. 12.

On rehearing, at the request of the Attorney General of the State of Arkansas, the opinion was slightly modified. That modification is reported on an unnumbered page of Advanced Reports No. 8, correcting page 196 of 254 Ark. and is copied at Appendix C, *infra*, p. 15.

JURISDICTION

Both the majority and dissenting opinions of the Arkansas Supreme Court were delivered on April 9, 1973. Upon a timely application for rehearing, the opinion was modified with the filing of an opinion on April 30, 1973, but rehearing was denied (R. 553)[1].

A Motion for Recall and Stay of Mandate was filed by petitioner on May 24, 1972 and was denied by a per curiam order on June 11, 1973. A Second Motion for Recall and Stay of Mandate was filed and was granted on July 9, 1972.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The time to file this Petition for Writ of Certiorari was extended to August 27, 1973 by the order of Mr. Justice Blackmun entered on July 30, 1973.

[1] Reference is made by page number to the certified record of the proceedings below which is filed with this petition.

QUESTION PRESENTED

Whether the Arkansas abortion statutes can be employed to prosecute a layman for the crime of inducing an abortion where those statutes except from criminality only a life-saving procedure on behalf of the mother without regard to the stage of pregnancy or recognition of other involved interests and make no distinction between lay persons and medical doctors.

Statutory and Constitutional Provisions Involved

1. This case involves Section One of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 41-303, Arkansas Statutes Annotated (1947). The entire chapter governing abortion, Arkansas Statutes Annotated, Sections 41-303 - 41-310 is reproduced at Appendix D, *infra*, p. p. 16.

STATEMENT

The petitioner, a disabled trainman, was indicted for the offense of inducing an abortion. The woman involved was Kaye Kuykendall. At the time of the indictment, May was an alderman of the Second Ward and was a candidate seeking the office of mayor of North Little Rock. It was charged that May had committed the crime on October 9, 1970 which was, incidentally, his birthday. The defense was an alibi. Over the two day trial, several witnesses appeared and May himself testified. The jury returned its verdict finding May guilty and fixed his punishment at a $1,000.00 fine and four years imprisonment (R. 521).

The record discloses that at the time of trial, Kaye Kuykendall and her husband, Allan, had been married about four years (R. 220). They had one son, who was then two years of age (R. 254). The Kuykendalls had previously been separated due to marital difficulties, and had reconciled only briefly before Mrs. Kuykendall discovered that she was again pregnant in mid-September 1970 (R. 220, 254-5). At that time they were experiencing financial problems (R. 255). The Kuykendalls discussed their plight and because of several reasons, they agreed that Mrs. Kuykendall should get an abortion although each realized that this was against the law in Arkansas[2] (R. 221, 255, 226).

At the end of September, Mrs. Kuykendall was approximately three weeks pregnant (R. 221). Therefore, when the abortion was performed, Mrs. Kuykendall was near her fifth week of pregnancy.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Well in advance of trial, petitioner filed a Motion to Dismiss which contended, *inter alia*:

> "That Ark. Stat. Ann. § 41-303 is unconstitutional in that its provisions are vague, unreasonable and deprives a female of her individual right to determine if she should bear a child." (R. 43)

The trial judge held no hearing on the motion, but announced his decision overruling the motion during the second day of the trial (R. 334).

[2] The Kuykendalls did not make any effort to follow the statutory procedure to secure an abortion.

On appeal, while reversing the conviction of May for other reasons, the majority of the Arkansas Supreme Court concluded:

> "The appellant (May) has no standing to personably attack the constitutionality of § 41-303 because it is not unconstitutional as applied to him. As applied to appellant, § 41-303 simply prohibits a layman from performing or inducing an abortion. As we have pointed out, the United States Supreme Court says in *Doe* and *Roe* that the states have a right to prohibit such activities by one other than a physician. In *Brumelle, supra* [*Commonwealth v. Burmelle*, 277 NE 2d 326 (Mass. 1971)] the standing of the accused to attack the statute as unconstitutional was brought into question and his standing to make that attack was denied because Brumelle was not a licensed physician."

The lone dissenter, Mr. Justice Byrd, would have declared the statute, Ark. Stat. Ann. § 41-303, unconstitutional. See Appendix B.

REASONS FOR GRANTING THE WRIT

This case involves a substantial question which affects an important constitutional right which was resolved by the Arkansas Supreme Court contrary to the decisions of *Roe v. Wade*, 410 U.S. 113 (Preliminary Print Part 1), 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton*, 410 U. S. 179 (Preliminary Print Part 1) 93 S. Ct. 739, 35 L. Ed. 2d 201. As a consequence, there is total uncertainty and indeed apprehension regarding the status of the Arkansas abortion statutes at this time.[3] There is justifiable fear among the members of the medical

[3] See opinion letter of Arkansas Attorney General, dated June 7, 1973, Appendix E.

profession and the hospitals in Arkansas as to legality of an abortion which does not comport with the letter of the existing applicable state statutes.

The same statutory scheme which was condemned and diluted in *Roe* and *doe* presently prevents women in Arkansas as it prevented Kaye Kuykendall in September and October of 1970 from procuring legitimate medical service in a properly equipped and staffed hospital or clinic.

The thrust of the majority opinion of the Arkansas Supreme Court, which is artificially prolonging the life of Arkansas' abortion laws, was that May had no standing to challenge the very laws under which he stood convicted and sentenced to a four year term of imprisonment and a fine of $1,000.00, and will, unless prevented by this Court, be subjected to yet a second trial and possible punishment under those same statutes. In view of the circumstances, it is difficult to imagine one who has a greater interest or a better standing than May to test the constitutionality of the criminal abortion statutes.

There is, even at this time, a conflict among the courts of the several States as to the status of the respective abortion statutes.

In *State v. Hultgren*, 204 N.W.2d 199, decided on February 2, 1973 it was recognized that a layman convicted of abortion could successfully challenge the constitutionality of the abortion statutes of Minnesota even though that issue had not been raised in the trial court. See also *State v. Hodgson*, 204 N.W.2d 199 (Minn. 1973); *State v. Munson*, 206 N.W.2d 434 (S.D. April 5, 1973); *People v. Frey* and *People v. Mirmelli*, 294 N.E.2d

257 (Ill. March 20, 1973); *People v. Bell*, 294 N.E.2d 711 (Ill. April 2, 1973); *State v. Strance*, 509 P. 2d 1217 (N.M. February 9, 1973); *Commonwealth v. Page*, 303 A. 2d 215 (Pa. March 29, 1973).

Another unfortunate result of the decision of the Arkansas Supreme Court is that women who are desirous and, under the rule announced in *Doe* and *Roe*, are eligible for abortions must still submit themselves to perhaps dangerous circumstances, the unskilled, travel to another jurisdiction, or accept the unwanted child.

It is apparent that neither the Supreme Court of Arkansas nor those charged with the obligation of instituting criminal prosecutions in Arkansas intend to comply with the declarations of *Doe* and *Roe*.

CONCLUSION

Certiorari should be granted in order to settle and clarify the status of the abortion laws of Arkansas.

Respectfully submitted,

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AUGUST, 1973

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 5796

John O. May
Appellant
v.
State of Arkansas
Appellee

Opinion Delivered April 9, 1973.
Circuit Court, First Division, William J. Kirby, Judge: Reversed and Remanded.

Lyle Brown, Justice

J. O. May appeals from a conviction on a charge of inducing an abortion. It was the theory of the State that at the request of Kaye and Allan Kuykendall, Bill McCord, Jr., contacted Teresa Barrett who he had reason to believe could get in touch with someone who would perform an abortion. Teresa was said to have contacted appellant and arranged for the abortion. Kaye Kuykendall testified that the illegal act was committed on October 9, 1970, which happened to be appellant's birthday. Appellant's defense was an alibi. He, along with corroborating witnesses, testified that appellant was in DeValls Bluff celebrating his birthday. Those are about all the facts that are necessary to an understanding of the issues on appeal. Such additional facts as are pertinent to an understanding of any of the issues will be subesquently recited.

We shall first treat appellant's argument that our abortion statutes, Ark. Stat. Ann. §§ 41-303-310 (Supp. 1971) are unconstitutional in light of two recent decisions of the United States Supreme Court. *Doe v. Bolton*,

Attorney General of Georgia,____U.S.____(Jan. 22, 1973); *Roe v. Wade, District Attorney of Dallas County*, ____U.S.____(Jan 22, 1973). In both cases, *parts* of the abortion laws of the respective states were declared unconstitutional. In *Roe*, it was determined by the Court that a pregnant single woman had standing to attack the Texas statute; the plaintiffs in *Doe* were an indigent, married, pregnant Georgia citizen and certain licensed physicians, standing being conferred, so the Court held, on the latter through *Epperson v. Arkansas*, 393 U.S. 97 (1968). The most salient aspect of both cases (*Roe* and *Doe*) for the purposes of the appeal in the case at bar is that the decisions in both *Roe* and *Doe* contemplate the performance of abortions only by licensed physicians. In fact as to laymen, *Roe* makes the statement, in its summary under XI that a state "may proscribe any abortion by a person who is not a physician". Our Ark. Stat. Ann. § 41-303 in effect prohibits abortions by two classes of people, physicians and laymen. The effect of the Supreme Court holdings was to strike down the prohibition as against physicians during the period preceding approximately the end of the first trimester. The cited section can be left intact as to laymen; that was the effect of our holding in *Borchert v. Scott*, 248 Ark. 1041, 460 S.W. 2d 23 (1970), where we said: "If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other". An abortion case in point in this respect is *Commonwealth v. Brunelle*, 277 N.E. 2d 826 (Mass. 1971).

The appellant has no standing to personally attack the constitutionality of § 41-303 because it is not unconstitutional as applied to him. As applied to appellant, § 41-303 simply prohibits a layman from performing or inducing an abortion. As we have pointed out, the United

States Supreme Court says in *Doe* and *Roe* that the states have a right to prohibit such activity by one other than a physician. In *Brunelle, supra*, the standing of the accused to attack the statute as unconstitutional was brought into question and his standing to make that attack was denied because Brunelle was not a licensed physician. The court said: "Only persons whose interests are affected by a statute may assert that it is unconstitutional".

We are compelled to reverse and remand for new trial, *principally* because appellant was denied the right to attack the credibility of some of the State's key witnesses on the grounds of certain acts of moral turpitude. For example, appellant sought to elicit from Mrs. Kuykendall the fact that she had sexual relations with another witness, Bill McCord, Jr., while she was married to Allan Kuykendall. (Mrs. Kuykendall admitted the act in her testimony in chambers.) Appellant also sought to introduce testimony that he had found the State's witness, Bill McCord, Jr., in an alley suffering from the effects of drugs and reported the incident to Bill's father. The credibility of a witness may be impeached by showing acts of moral turpitude. *Hale v. State*, 252 Ark. 1040, 483 S.W. 2d 228 (1972); *Heath v. State*, 249 Ark. 217, 459 S.W. 2d 420 (1970). Still more in point are such cases as *Garrard v. State*, 113 Ark. 598, 167 S.W. 485 (1914), intercourse with other men; *Rowe v. State*, 155 Ark. 419, 244 S.W. 463 (1922), intercourse with others; *Schooley v. State*, 176 Ark. 895; 2 S.W. 2d 67 (1928) immoral acts.

Several other points for reversal are advanced. Some of those will not arise on retrial; others have no merit; and some present situations in which a timely record was not made.

Reversed and remanded.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 5796

John O. May
Appellant
V.
State of Arkansas
Appellee

Opinion Delivered April 9, 1973.
Dissent.

Conley Byrd, Associate Justice

I disagree with so much of the majority opinion that holds that appellant, a layman, has no standing to attack the constitutionality of our abortion Statute, Ark. Stat. Ann. § 41-303 (Supp. 1971). That statute provides:

> "It shall be unlawful for any one to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion, or premature delivery of any foetus before or after the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisoned in the penitentiary not less than (1) nor more than [5] years."

The Texas statute involved in *Roe v. Wade*, ——U.S.——, 93 S. Ct. 705, 35 L. ed. 147 (1973), provided:

"Article 1191. Abortion

> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."
>
> "Article 1196. By medical advice
> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

Justice Blackmun in delivering the majority opinion stated:

> "Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how urgent the case."

I can find nothing in *Borchert v. Scott*, 243 Ark. 1050-H, 460 S.W. 2d 28 (1970), to support the majority position here. There the issue was whether the act was severable and the matter was stated in this language:

> "When this case was before us on direct appeal we held the Documentary Tax Stamp Act, being Act 239 of 1969, unconstitutional and void under Amendment 20 to the Constitution of Arkansas. *Borchert v. Scott, et al*, 248 Ark. 1041, 460 S.W. 2d 28 (1970). We have again considered the case on

> rehearing and have concluded that the Act is severable and that portions of it are constitutional and valid. In reappraising the intent of the legislature in enacting Act 239, we conclude that we cannot say the legislature would not have passed Act 239 without § 6 or subsections (b), (2) and (3) written. . . ."

Here, Ark. Stat. Ann. § 41-303 provides that, "any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisoned in the penitentiary not less than (1) nor more than [5] years." The first portion thereof makes it unlawful "for anyone . . . to produce an abortion." No exception is made for any physician and as pointed out in *Roe v. Wade, supra*, it appears to me that the statute, *as a unit*, must fall with its unconstitutionality.

Our statute as written makes no distinction as to the occupations of persons prohibited. Thus, it appears to me that appellant has a standing to complain that the statute is being unequally applied to him when it cannot be validly applied to other persons within the class that is prohibited.

For the reasons stated, I respectfully dissent to that portion of the opinion upholding the validity of the statute.

APPENDIX C
SUPREME COURT OF ARKANSAS

No. 5796

John O. May
Appellant

v.

State of Arkansas
Appellee

Opinion Delivered April 30, 1973.
Modified.

Lyle Brown, Justice

The opinion is being modified by deleting the last two sentences on page three and substituting the following:

Appellant also sought to elicit on cross-examination of Bill McCord, Jr., a State witness, that McCord had been found in an alley suffering from the effects of drugs. On cross-examination the credibility of a witness may be impeached by showing acts of moral turpitude.

APPENDIX D

"41-303. Unlawful to induce abortion by use of medicine or drugs or by any other means-Penalty.- It shall be unlawful for any one to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion, or premature delivery of any foetus before or after the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisoned in the penitentiary not less than (1) nor more than five (5) years."

"41-304. Conditions which make abortion legal.- Notwithstanding any of the provisions of Section 1 [§ 41-303] of this Act [§§ 41-303-41-310] it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in Arkansas by the Arkansas State Medical Board, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest which was reported to the Prosecuting Attorney, or his deputy within seven (7) days after the alleged rape or incestuous act. The Prosecuting Attorney shall submit a written

report of said complaint to the doctor and said report to be made a permanent part of patient's medical records."

"41-305. Consent required for legal abortion.-No legal abortion may be performed until the pregnant woman has given written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent."

"41-306. Residence requirement for legal abortion-Exception.- No legal abortion shall be performed unless the pregnant woman shall have resided in the State of Arkansas for a period of at least four (4) months immediately preceding the operating being performed except in the case of emergency where the life of the said woman is in danger."

"41-307. Restriction on where legal abortions may be performed.- Legal abortions may be performed only in a hospital licensed by the Arkansas State Board of Health and accredited by the Joint Commission of Accreditation of Hospitals."

"41-308. Filing of certificate justifying abortion prior to performance.- Before any legal abortion shall be performed by a doctor of medicine there must be filed with the hospital where said abortion is to be performed the certificate of three (3) doctors of medicine not engaged jointly in private practice, one (1) of whom shall be the person performing the abortion, which certificate shall state that said doctors of medicine have examined said

woman and certify in writing the circumstances which they believe justify the abortion."

"41-310. Immunity from civil liability of persons who refuse to participate in or perform abortions.-(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the state of any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such persons would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor he a condition precedent to the receipt of any public benefits."

APPENDIX E

STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
Justice Building, Little Rock

June 7, 1973

The Honorable Henry J. Osterloh
State Representative
4521 Greenway Drive
North Little Rock, Arkansas 72116

Dear Representative Osterloh:

This is in response to your inquiry as to the status of the abortion laws in the State of Arkansas. The abortion statutes are codified as Ark. Stats. 41-301 through 41-310.

Although neither the United States Supreme Court nor the Supreme Court of Arkansas has spoken definitively respecting our statutory provisions, the language of *Roe v. Wade*, ____U.S.____, 35 L. Ed. 2d, 147 (1973) and *Doe v. Bolton*, ____U.S.____, 35 L. Ed. 2d, 201 (1973) might reasonably be construed as rendering Ark. Stat. 41-304, 41-306 and 41-309 partially or wholly unconstitutional. For examination of some of the provisions in question by the Arkansas Supreme Court, you are referred to *May v. State*, 254 Ark. 194, (1973).

As you know, however, Arkansas Court decisions are numerous for the proposition that a statute is clothed with a presumption of constitutionality and will not be declared

unconstitutional unless it is forbidden by the State or Federal Constitution in express terms or by necessary implication. In addition, it is the duty of the courts, in testing the validity of a statute to resolve all doubts in favor of the legislative action and to uphold it unless it is clearly an abuse of legislative power. Our Court in *Fletcher v. Oliver*, 25 Ark. 289 stated "It is the bounden duty of courts not to defeat the will of the people, expressed through their representatives in the legislative halls, unless it is clearly manifest that some vested right or provision of the Constitution has been invaded."

Further, it is the duty of this office to uphold the laws enacted by the General Assembly until and unless they be overturned by a court of competent jurisdiction.

A Motion to Recall the Mandate has been filed in *May*, supra., by the Defendant preparatory to an appeal to the United States Supreme Court. Quite possibly, we may have a judicial determination of the validity of our abortion laws.

Very truly yours,

JIM GUY TUCKER
Attorney General

By: Rodney Parham
Deputy Attorney General

RP:js